Supreme Court, U.S.
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No. _____

In The

Supreme Court of the United States

MARSHA MILLER,

Petitioner,

v.

HOUSTON INDEPENDENT SCHOOL DISTRICT,

Respondent.

On Petition For A Writ Of Certiorari To The Supreme Court Of Texas

PETITION FOR A WRIT OF CERTIORARI

RICHARD B. KUNIANSKY
Counsel of Record
KUNIANSKY & ROZAN
Attorneys for Petitioner
5051 Westheimer, Suite 700
Houston, Texas 77056
(713) 622-8333

COCKLE LAW BRIEF PRINTING CO., (800) 225-6964
OR CALL COLLECT (402) 342-2831

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QUESTIONS PRESENTED

QUESTION NO. 1: Whether state government and governmental agencies are restrained by the Constitution from acting arbitrarily and capriciously with respect to state employees.

QUESTION NO. 2: Whether a vague state school district grievance policy that provides no guidance to an employee on their duties while the grievance is pending, violates due process.

QUESTION NO. 3: Whether lengthy delay in a state school district grievance procedure until a point where it is rendered a nullity, violates due process of law.

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PETITION FOR A WRIT OF CERTIORARI

Petitioner prays that a writ of certiorari issue to review the judgment of the Supreme Court of Texas entered in this case on April 3, 2001, denying a Petition for Rehearing and thereby affirming the Judgment of the Texas Court of Appeals entered March 2, 2001.

OPINION BELOW

The opinion of the Court of Appeals of Texas, Houston Division, 1st District, is reported at 151 S.W.2d 676 and reproduced at Appendix A.

STATEMENT OF JURISDICTION

This Court has jurisdiction of this petition for a writ of certiorari under 28 U.S.C. § 1257(a) which provides for United States Supreme Court review of final judgments rendered by the highest court of a state where a state has deprived a citizen of a right, privilege or immunity guaranteed by the United States Constitution.

UNITED STATES CONSTITUTIONAL PROVISION INVOLVED

The Fourteenth Amendment of the United States Constitution provides in pertinent part that "No state shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States;

nor shall any state deprive any person of life, liberty, or property, without due process of law."

STATEMENT OF THE CASE

Marsha Miller was employed by the Houston Independent School District ("HISD") for 28 years as a teacher and counselor. For the prior 16 years, since the birth of her daughter, she never missed a day of work. During the last 13 years of her career, she was assigned to Lamar High School ("Lamar H.S."). Tragically, in the spring of 1997, Ms. Miller's teenage daughter began to exhibit symptoms of severe psychological distress, which manifested itself primarily through self-mutilation. Specifically, Ms. Miller's daughter cut herself with a paring knife, mutilating herself on her stomach, arms, thighs, wrists, forehead, cheeks and chin, making over 100 cuts to her body. Nonetheless, despite her years of exemplary service, without prior consultation or concern for the hardship it would impose upon Ms. Miller, on July 18, 1997, HISD transferred her to Stephen F. Austin High School ("Austin H.S."). Ms. Miller contested the involuntary transfer. HISD knew the primary reason she contested the involuntary transfer was due to her daughter's psychological problems and Ms. Miller's need to be home in the afternoons to watch over her daughter and to prevent her from engaging in self-mutilation. HISD also knew that by transferring Ms. Miller, her commute time would increase by approximately one hour in each direction, placing her on the road for more than four hours each day. HISD refused Ms. Miller's request to reconsider. Ms. Miller immediately retained the services of an

attorney, Mr. Michael Tomasic. Mr. Tomasic communicated via letter with HISD Superintendent Dr. Rod Paige[1] regarding Ms. Miller's transfer. In the letter he specifically advised them of Ms. Miller's circumstances, the facts regarding her daughter, the fact that Ms. Miller's total commute time was approximately two hours, and that her commute time would double if transferred. He also advised that the transfer would effectively work as a constructive termination of her employment. Dr. Paige sent a letter to him stating that "[i]f Ms. Miller is concerned about the assignment, she should follow the district policy for dispute resolution." Mr. Tomasic then sought to appear before the HISD Board where he made known his concerns that HISD needed some procedure to resolve problems such as the one Ms. Miller faced. After that meeting, Dr. Susan Scalfani, Dr. Paige's Chief-of-Staff, met with Mr. Tomasic and Ms. Miller to discuss both the Ombudsman Program and the Grievance Process as a means for Ms. Miller to resolve the problem she was facing. Ms. Miller met with Mr. Trahan, a member of the Ombudsman team. He was unable to resolve the problem.

On September 22, 1997, Ms. Miller filed her grievance. HISD acknowledged in writing receipt of the request on September 25, 1997, and assigned Dr. Margaret Stroud as the administrator who would handle the dispute. During the time Ms. Miller pursued her relief through the grievance process, she did not report for work at Austin H.S. Instead, she called in every day. HISD ceased paying Ms. Miller during this period.

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[1] Dr. Rod Paige is currently the Secretary of Education in the Bush Administration.

Under HISD's grievance policy, Dr. Stroud was required to hold a conference within 10 days of receipt of Ms. Miller's request, or no later than October 4, 1997. However, the conference was actually held on October 31, 1997. In the interim, Mr. Trevino, the Principal of Austin H.S., who knew Ms. Miller had filed the grievance, nonetheless recommended her termination on October 17, 1997, a date after the conference was required to have been held, but before the date the conference was actually held.

Dr. Stroud determined that the transfer was lawful under HISD's policies and procedures, and directed Ms. Miller to report to work at Austin H.S. Dr. Stroud also directed HISD personnel to work with Ms. Miller to locate a site nearer to her home, which HISD personnel failed to do. Ms. Miller promptly reported for work at Austin H.S. HISD's Board of Trustees, under its policies and procedures, should have made every effort to hear Ms. Miller's dispute within 30 days. HISD's Board failed to consider Ms. Miller's dispute for two months, but, did, on November 20, 1997, find the time to consider Mr. Trevino's recommendation for termination and act upon it.

Ms. Miller protested the termination by submitting written notice to the Commissioner of Education, Texas Education Agency and requesting a hearing. The hearing was held before a certified independent hearing examiner, Mr. John W. Donovan, on or about April 29, 1998. On May 21, 1998, he issued his written recommendation finding in favor of Ms. Miller. In his discussion of the dispute, he stated that HISD's policies and procedures pertaining to this particular circumstance were not "so readily clear

and established." He further stated, "[t]he directives received by Ms. Miller from the various HISD officials are somewhat confusing, if not conflicting." Additionally, he found that "[n]ot only was communication between HISD and Ms. Miller poor, there appears to have been poor communication between the various HISD departments and divisions." He concluded there was a reasonable basis for Ms. Miller's conduct.

The examiner made numerous fact findings favorable to Ms. Miller that HISD later rejected or changed:

* * *

> 7. In the event an employee is dissatisfied with the decision of the immediate supervisor (Level I), the employee may appeal to the next vertical line supervisor in a Level II hearing which is required to be held within ten (10) days.
>
> * * *
>
> 9. There is no written policy instruction or direction within the HISD Grievance Process that states that an employee must have to physically report for work while grieving an involuntary transfer during the Grievance Process.
>
> 10. It is also possible for an employee to be assigned to their home while undergoing the Grievance Process.
>
> * * *
>
> 41. The hearing before Dr. Stroud should have occurred within ten (10) days of September 22, 1997, according to policy, however it *[sic]* the original date was canceled and it did not occur until the last day of October, 1997.

42. During this time, Mr. Trevino made his recommendation to terminate Ms. Miller on October 17, 1997, after the time in which her Level II grievance should have been heard and decided, had HISD followed the guidelines and procedures.

* * *

47. The HISD School Board conducted it's *[sic]* Level III hearing in February, 1998 approximately two (2) months later than the thirty (30) days in which such hearing is supposed to be conducted, and upheld Dr. Stroud's determination.

48. Ms. Miller substantially performed under the Grievance Process and complied with the instructions and directives give[n] and set forth in Dr. Paige's September 10, 1997 letter.

* * *

52. Ms. Miller relied upon the instructions and directions of the representatives of HISD in filing her grievance and attempting to alleviate the difficulty in having to travel the extra time to Austin High School.

* * *

Original conclusions of law:

* * *

2. HISD has failed to sustain its burden of proof that there was lawful cause for discharge of Ms. Miller.

3. HISD has failed to sustain its burden of proof that lawful cause for discharge existed to terminate Ms. Miller's continuing contract for:

(a) repeated failure to comply with official directives and established school board policy; and

(b) repeated and continuing neglect of duties.

In the end, the hearing examiner found that HISD had failed to meet its burden of proof that lawful cause existed for discharge for failure to comply with official directives and established school board policy, and repeated and continued neglect of duties. He recommended that Ms. Miller be reinstated, but that she not receive pay for the time she was absent during the grievance process.

Rather than follow Mr. Donovan's findings, HISD's Board arbitrarily and capriciously rejected or changed the findings and conclusions to make the result come out exactly opposite that recommended by the examiner: to wit, that HISD had met its burden of proof that lawful cause existed for discharge due to failure to comply with official directives and established school board policy, and repeated and continued neglect of duties. When finished, HISD's modified findings read as follows:

* * *

7. In the event an employee is dissatisfied with the decision of the immediate supervisor (Level I), the employee may appeal to the next vertical line supervisor in a Level II hearing which should be held within ten (10) days. If the Level II conference is not held within the allotted timeline, the employee may immediately appeal the concern/dispute to the next level.

* * *

41. The hearing before Dr. Stroud should have occurred within ten (10) days of September 22,

> 1997, according to policy, however it *[sic]* the original date was canceled and it did not occur until the last day of October, 1997. Nonetheless, the employee always has the right to immediately appeal the dispute to the next level if time frames are not met.
>
> 42. During this time, Mr. Trevino made his recommendation to terminate Ms. Miller on October 17, 1997.
>
> * * *
>
> 47. The HISD School Board conducted it's *[sic]* Level III hearing in February, 1998 approximately two (2) months later than the thirty (30) days in which the Board is supposed to make every reasonable effort possible to hear it, and upheld Dr. Stroud's determination.
>
> 48. Ms. Miller substantially performed under the Grievance Process but failed to comply with the instructions or directives give[n] and as set forth in Dr. Paige's September 10, 1997 letter.

HISD struck Conclusion of Law 2 and altered Conclusion of Law 3 to state:

> 3. HISD has met its burden of proof that lawful cause for discharge existed to terminate Ms. Miller's continuing contract for:
>
> (a) repeated failure to comply with official directives and established school board policy; and
>
> (b) repeated and continuing neglect of duties.

The HISD Board then terminated Ms. Miller's teaching contract. Ms. Miller appealed HISD's changes to the Commissioner of Education. On August 19, 1997, the Commissioner issued his opinion affirming Ms. Miller's

termination. Ms. Miller appealed the Commissioner's decision to the 133rd District Court, Harris County, the Honorable Lamar McCorkle presiding. The Court upheld the Commissioner's decision. Ms. Miller then appealed to the Texas Court of Appeals, Houston Division, 1st District. They affirmed the District Court decision. Ms. Miller then appealed to the Texas Supreme Court who denied her petition for discretionary review.

QUESTION NO. 1: Whether state government and governmental agencies are restrained by the Constitution from acting arbitrarily and capriciously with respect to state employees.

The Due Process Clause of the Fourteenth Amendment of the United States Constitution provides in pertinent part that:

> "No state shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any state deprive any person of life, liberty, or property, without due process of law . . . "

The Supreme Court has explicitly held that educators employed by the State have both a "liberty" interest and a "property" interest that may not be defeated without compliance with the Due Process Clause of the Fourteenth Amendment of the United States Constitution. *See, e.g., Board of Regents of State Colleges v. Roth*, 408 U.S. 564 (1972) and *Perry v. Sindermann*, 408 U.S. 593 (1972).

Roth was a professor at Wisconsin State University – OshKosh. He was hired for a fixed term, but was informed he would not be rehired for the next academic year. Under Wisconsin statutory law, a state university

teacher can acquire tenure as a "permanent" employee only after four years of year to year employment. Having acquired tenure, a teacher is entitled to continued employment "during efficiency and good behavior." A relatively new teacher without tenure, however, is under Wisconsin law entitled to nothing beyond his one-year appointment. There are no statutory or administrative standards defining eligibility for re-employment. State law thus clearly leaves the decision whether to rehire a non-tenured teacher for another year to the unfettered discretion of state university officials. 408 U.S. at 566-57. The University informed Roth he would not be rehired for the next academic year. No reason was given to Roth for this decision, nor was he provided any sort of hearing to challenge this decision. Roth brought suit in Federal District Court alleging that the decision not to rehire him for the next year infringed his Fourteenth Amendment rights. *Id.* at 568. The Supreme Court observed that "in the area of public employment, the Court has held that a public college professor dismissed from an office held under tenure provisions,[2] and college professors and staff members dismissed during terms of their contracts,[3] have interests in continued employment that are safeguarded by due process." *Id.* at 576-77. Similarly, "this principle 'prescribing summary dismissal from public employment without hearing or inquiry required by due process' also applied to a teacher recently hired without tenure or formal contract, but nonetheless, with a clearly implied promise of continued employment." *Id.* at 577.[4]

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[2] Citing *Slochower v. Board of Education*, 350 U.S. 551 (1956).

[3] Citing *Wieman v. Updegraff*, 344 U.S. 183 (1952).

[4] Citing *Connell v. Higginbotham*, 403 U.S. 207 (1971).

Nevertheless, the Supreme Court held that Professor Roth had no "property interest"[5] that implicated the Due Process Clause of the Fourteenth Amendment. The court observed that "property interests" are not created by the Constitution, but by state law. *Id.* at 578. Therefore, "the terms of [Roth's] appointment secured absolutely no interest in re-employment for the next year. They supported absolutely no possible claim of entitlement to re-employment, nor, significantly, was there any state statute or University rule or policy that secured his interest in re-employment or that created any legitimate claim to it. In these circumstances, [Roth] surely had an abstract concern in being rehired, but he did not have a property interest sufficient to require the University authorities to give him a hearing when they declined to renew his contract of employment." *Id.* at 578.

Justice Marshall in dissent observed:

> The prior decisions of this Court, discussed at length in the opinion of the Court, establish a principle that is as obvious as it is compelling – i.e., federal and state governments and governmental agencies are restrained by the Constitution from acting arbitrarily with respect to employment opportunities that they either offer or control. Hence, it is now firmly established that whether or not a private employer is free to act capriciously or unreasonably with respect to employment practices, at least absent statutory or contractual controls, a government employer

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[5] In a companion case where the professor alleged that he had *de facto* tenure, the Supreme Court held he may have a "property interest" entitled to due process protection. *Perry v. Sindermann*, 408 U.S. 593 (1974).

> is different. The government may only act fairly and reasonably.

Id. at 588.

> Employment is one of the greatest, if not the greatest, benefits that governments offer in modern-day life. When something as valuable as the opportunity to work is at stake, the government may not reward some citizens and not others without demonstrating that its actions are fair and equitable. And it is procedural due process that is our fundamental guarantee of fairness, our protection against arbitrary, capricious, and unreasonable government action.

Id. at 589.[6]

Marsha Miller has literally spent her entire life as an active participant in the Houston Independent School District. As a child and teenager, she attended elementary school, middle school, and high school at HISD. As an adult, she was a teacher and a guidance counselor for 28 years. For 16 years prior to the instant dispute, she did not miss a single day of work. She was a loyal employee who consistently received favorable reviews. Notwithstanding this fact, and purely for arbitrary and capricious reasons, the school district re-assigned Ms. Miller to a school that would require a four hour daily commute as opposed to a two hour daily commute. This would have prevented Ms. Miller from supervising her daughter who was mutilating herself with a knife. When Ms. Miller protested this re-assignment through every legitimate means available to her under school district policy, she

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[6] *Board of Regents of State Colleges v. Roth*, 408 U.S. 564, 588-89 (J. Marshall, dissenting).

was simply met with a blanket response that because we can re-assign you, we are re-assigning you.

Perhaps a school district has the authority within the United States Constitution to make arbitrary and capricious decisions that have devastating consequences upon their most valuable assets, their employees.

Alternatively, this court may choose to adopt the view of Justice Marshall that "federal and state governments and governmental agencies are restrained by the Constitution from acting arbitrarily with respect to employment opportunities that they either offer or control . . . the government may only act fairly and reasonably." *Roth, supra* at 588.

The Court should grant this writ to determine this issue of national importance. Education is currently the number one priority of the Bush administration. The education bill in the Senate is known as S.1., "Appropriately named because it is my No. 1 priority, it is your No. 1 priority."[7]

President Bush's education spending package would give the U.S. Department of Education a 11.5 percent funding boost, the largest of any of the Cabinet-level agencies. Under Bush's budget proposal, spending for education would increase to $44.5 billion.

However, regardless of the billions of dollars expended on education, the education process in the country will be futile if its most precious asset is squandered –

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[7] Comments of President George Bush on April 24, 2001 welcoming the National Teacher of the Year at the White House.

school teachers, counselors and other educators responsible for the education of the children of this country.

This court should accept this writ to decide whether school districts should be required to preserve this valuable and irreplaceable asset, or whether they may squander it arbitrarily and capriciously.

QUESTION NO. 2: Whether a vague state school district grievance policy that provides no guidance to an employee on their duties while the grievance is pending, violates due process.

Ms. Miller scrupulously followed the procedures available to her in protesting her re-assignment from Lamar H.S. to Austin H.S. The grievance procedures were vague regarding the duties imposed upon Ms. Miller during the pendency of the process and in particular, whether she had to report to her re-assigned school. Moreover, she received conflicting instructions from the school board administration. Specifically, Dr. Paige's September 10, 1997 letter to Mr. Tomasic stated that "[y]ou may want to instruct Ms. Miller to report to Austin High School. Her failure to follow the previous directive may have serious consequences." The letter did not state Ms. Miller had to physically report to Austin H.S., nor did it state that the failure to physically report would result in a recommendation of termination. The letter further stated that "[i]f Ms. Miller is concerned about the assignment, she should follow the district policy for dispute resolution." Ms. Miller followed this advice.

State rules and regulations must be drawn with sufficient clarity to inform people of the conduct they must

take to avoid the sanctions of the particular rule or regulation. Under procedural due process, a rule or regulation is not constitutionally fair if it fails to give such information. *Keyishian v. Board of Regents of the University of the State of New York*, 385 U.S. 589 (1967).

This court should grant the writ to determine this issue of national importance. Specifically, whether school districts may promulgate rules and procedures to resolve issues through grievance procedures, but enact them in such a vague manner as to fail to inform the employees of their duties during the pendency of the grievance proceedings, and to further exacerbate the vagueness through conflicting instructions of school administrators.

QUESTION NO. 3: Whether lengthy delay in a state school district grievance procedure until a point where it is rendered a nullity, violates due process of law.

On September 22, 1997, Ms. Miller filed a formal grievance with HISD regarding her re-assignment to Austin H.S. According to HISD regulations, a hearing should have been held within 10 days. This regulation was ignored and a hearing was not held until October 28, 1997, and a written decision was not entered until November 5, 1997. This written decision stated that "Ms. Miller should report to the Austin High School assignment as directed. She should continue in this assignment while seeking one that is closer to her home . . . " Importantly, there was no recommendation that Ms. Miller be terminated. To the contrary, she was to continue working until a closer assignment became available. Ms. Miller complied with this directive and reported to work at Austin H.S. On October 17, 1997, after the grievance

should have been heard, but before it was actually heard, Austin H.S. Principal Trevino recommended that Ms. Miller be terminated. This recommendation was approved by the Board of Education on November 20, 1997.

Since the recommendation to terminate Ms. Miller's contract was made prior to the grievance procedure findings, but after the grievance procedure hearing should have been held, the entire grievance process was rendered a nullity.

In *Cleveland Board of Education v. Loudermill*, 470 U.S. 532 (1985), Loudermill was terminated by his school district, and provided only with a post-termination appeal. Loudermill argued the statute "was unconstitutional on its face because it did not provide the employee an opportunity to respond to charges against him prior to removal. As a result, discharged employees were deprived of liberty and property without due process." Loudermill "also alleged that the provision was unconstitutional as applied because discharged employees were not given sufficiently prompt postremoval hearings." 470 U.S. at 536. The Supreme Court observed that the State created a "property right". However, the school district argued that the same statute that created the right also set out the procedure by which termination may take place. Therefore, the statute limited the property right. The Supreme Court, relying upon *Vitek v. Jones*, 445 U.S. 480 (1980) disagreed. "[M]inimum procedural requirements [are] a matter of federal law, they are not diminished by the fact that the State may have specified its own procedures that it may deem adequate for determining the preconditions to adverse official action." *Id.* at 541. Therefore, "it is settled that the 'bitter with the sweet' approach

misconceives the constitutional guarantee. If a clearer holding is needed, we provide it today. The point is straightforward: The Due Process Clause provides that certain substantive rights – life, liberty and property – cannot be deprived except pursuant to constitionally adequate procedures." *Id.*

Loudermill also alleged that the delay in the administrative proceedings also constituted a denial of procedural due process. *Id.* at 546-47. The Supreme Court agreed in principle that "[a]t some point, a delay in the post-termination hearing would become a constitutional violation." *Id.* at 547.[8]

Justice Brennan dissented in part "because the record in this case is insufficiently developed to permit an informed judgment on the issue of overlong delay":

> Loudermill alleged that it took the Commission over two and one-half months simply to hold a hearing in his case, over two months more to issue a non-binding interim decision, and more than three and one-half months after that to deliver a final decision. The Commission provided no explanation for these significant gaps in the administrative process; we do not know if they were due to an overabundance of appeals, Loudermill's own foot-dragging, bad faith on the part of the Commission, or any other of a variety of reasons that might affect our analysis. We do know, however, that under Ohio law the Commission is obligated to hear appeals like Loudermill's "within thirty days." Although

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[8] However, the Supreme Court found that the 9 month process was not unconstitutional *per se*. *Id.*

> this statutory limit has been viewed only as "directory" by Ohio courts, those courts have also made it clear that when the limit is exceeded, "[t]he burden of proof [is] placed on the [Commission] to illustrate to the court that the failure to comply with the 30-day requirement . . . was reasonable." I cannot conclude on this record that Loudermill could prove "no set of facts" that might have entitled him to relief after nine months of waiting.

Id. at 554-56.

The State should not be permitted to provide a grievance process, and then render it a nullity through inexcusable delay. As Justice Brennan observed in *Loudermill, supra* at 557, "[t]he Court previously has recognized that constitutional restraints or the timing, no less than the form of a hearing and decision will depend on appropriate accommodation of the competing interests involved."[9] 470 U.S. at 557.

"To be meaningful, an opportunity for a full hearing and determination must be afforded at least at a time when the potentially irreparable and substantial harm caused by suspension can still be avoided."[10] *Id.* at 558.

The hearing in the instant case was heard *after* the recommendation for termination, and therefore, was not a meaningful exercise in due process.

The court should grant the writ in this case to determine an issue of national importance in the area of school

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[9] Citing *Goss v. Lopez*, 419 U.S. 565 (1975).

[10] Citing *Barry v. Barchi*, 443 U.S. 55 (1979).

district grievance procedures. That is, whether lengthy delay in a state school district grievance procedure until a point where it is rendered a nullity, violates the Due Process Clause of the Fourteenth Amendment.

CONCLUSION

For the foregoing reasons, the Petition for Writ of Certiorari should be granted.

Respectfully submitted,

RICHARD B. KUNIANSKY
KUNIANSKY & ROZAN
Attorneys for Petitioner
5051 Westheimer, Suite 700
Houston, Texas 77056
(713) 622-8333

APPENDIX A

Court of Appeals of Texas,
Houston (1st Dist.).

Marsha MILLER, Appellant,
v.
The HOUSTON INDEPENDENT SCHOOL DISTRICT and The Texas Commissioner of Education, Appellees.

No. 01-99-01437-CV.

March 2, 2001.
Rehearing Overruled April 3, 2001.

Joseph Leo Lanza, Houston, for appellant.

Andy Ramzel, Houston, *George Warner*, Austin, for appellee.

Panel consists of *COHEN*, *JENNINGS*, and DUGGAN, * JJ.

OPINION

COHEN, Justice.

The Houston Independent School District (HISD) fired Marsha Miller because she did not go to work for three months. An independent hearing examiner recommended Miller not be terminated; the HISD school board rejected the examiner's recommendation and terminated Miller's contract; the Commissioner of Education upheld the board's decision; and the trial court affirmed the Commissioner's decision. We affirm.

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* The Honorable Lee Duggan, Jr., retired Justice, Court of Appeals, First District of Texas at Houston, sitting by assignment.

I. Background[1]

Miller had been a teacher or guidance counselor under a continuing contract[2] with HISD for 28 years, never missing work for 16 years before this dispute. In July 1997, HISD transferred Miller from Lamar High School to Stephen F. Austin High School. Miller's daughter was then experiencing severe psychological problems, including repeatedly cutting herself. At an August 13 meeting, Miller advised the Central District Superintendent, Raymond Reiner, that she could not work at Stephen F. Austin because the increased drive time there would reduce her time for and make her less able to cope with her daughter. Reiner nonetheless verbally and in writing instructed Miller to report to Stephen F. Austin. At least two other HISD representatives gave Miller the same directive.

For just under three months starting August 12, Miller did not report to Stephen F. Austin. However, she once advised its office by phone that she could not work there, and she called HISD's central office daily to report her absence. On September 10, Dr. Rod Paige, HISD's superintendent, sent Miller's attorney a letter stating, "You may want to instruct Ms. Miller to report to Austin High School. Her failure to follow the previous directive may have serious consequences. . . . " By letters dated

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[1] These background facts come from the hearing examiner's fact findings that were adopted in full and from undisputed facts on which the parties rely.

[2] One employed under a continuing contract may be discharged only for cause. *See* tex.Educ.Code Ann. § 21.154(4) (Vernon 1996).

August 21, September 25, and October 9, Stephen F. Austin's principal, Jose Trevino, ordered Miller to work or serious consequences would result; however, the hearing examiner found that HISD did not prove Miller received these.

On September 19, Miller and her attorney discussed the transfer with the HISD ombudsman, and on September 22, Miller began the official grievance process (hereinafter "the transfer protest"). Dr. Margaret Stroud heard the transfer protest on October 31, although the examiner found it should have been heard October 2. Trevino recommended firing Miller on October 17, after the date the examiner found the transfer protest should have been heard, but before it was actually heard. On November 5, Dr. Stroud upheld the transfer and ordered Miller to Stephen F. Austin. Miller complied and began work there three days later.[3]

On December 15, the board notified Miller it intended to discharge her for "repeated failure to comply with official directives and established school board policy" and "repeated and continuing neglect of duties," which her contract defined as lawful cause for discharge. *See also* tex.Educ.Code Ann. §§ 21.156(a) (Vernon 2996) [sic]. The basis was Miller's not reporting for work at Stephen F. Austin for three months, much of which overlapped the transfer protest. No one told Miller that she would be discharged if she did not report to Stephen F. Austin, but several HISD employees told Miller she could

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[3] Miller appealed Dr. Stroud's decision to the board, which upheld it. Miller does not contest that result in this appeal.

face disciplinary action, and Miller knew discharge was a form of disciplinary action. Miller requested a hearing on her discharge before an independent hearing examiner, John Donovan ("the discharge protest"). The examiner concluded that HISD had not shown lawful cause for discharge and recommended that Miller be reinstated without back-pay for her three-month absence. The board adopted some of the examiner's fact findings, rejected or modified others, rejected or modified some of his legal conclusions, renamed some fact findings as legal conclusions and then modified them, renamed part of his recommendation as a fact finding and accepted it, rejected the rest of his recommendation to reinstate Miller, and terminated Miller's contract. Miller appealed to the Commissioner, who upheld the board's order after modifying it slightly. The trial judge affirmed the Commissioner's order.

II. Statutory Scheme to Contest Discharge

Before a teacher under a continuing contract can be discharged, the board must notify her in writing of the proposed discharge and the grounds for it. tex.Educ.Code Ann. § 21.158 (Vernon 1996). The teacher may elect for a protest hearing before an independent hearing examiner. *Id.* §§ 21.159(a)-(b), 21.251-.253 (Vernon 1996). This hearing is evidentiary and resembles trial to the court. *Id.* § 21.255-.256(c)(e) (Vernon 1996) (examiner may issue subpoenas, administer oaths, rule on evidentiary issues, and allow depositions; rules of evidence apply; teacher may have counsel, present evidence, and cross-examine witnesses; hearing is conducted as trial without jury); *see also Gibson v. Tatum Indep. Sch. Dist.*, No. 040-R2-1099, p. 2

(Comm'r Educ.1999) (board's notification of proposed discharge is treated as pleading, to which special exceptions may be made). The examiner issues a written recommendation that contains fact findings and legal conclusions and that may include a proposal for granting relief. tex.Educ.Code Ann. § 21.257(a) (Vernon 1996).

At a non-evidentiary hearing, the board then considers the examiner's recommendation. *Id.* § 21.258(a)-(b) (Vernon 1996). The board must render a decision that includes fact findings and legal conclusions and that may include a grant of relief. *Id.* § 21.259(a) (Vernon 1996). The board may adopt, reject, or change the hearing examiner's legal conclusions or relief proposal, the only requirement being to give a written reason and legal basis for each one that is changed or rejected. *Id.* § 21.259(b), (d) (Vernon 1996). In contrast, the board may reject or change the examiner's fact findings only if they are not supported by substantial evidence. *Id.* § 21.259(c) (Vernon 1996). As with legal conclusions, the board must give a written reason and legal basis for each fact finding that is changed or rejected. *Id.* § 21.259(d).

The board's decision may be appealed to the Commissioner, who, with certain exceptions not applicable here, must consider the appeal only on the record from the examiner's and board's hearings. *Id.* § 21.301(c) (Vernon 1996). If a board that terminated a teacher's continuing contract modified the examiner's fact findings, the Commissioner must accept the board's decision unless it is arbitrary, capricious, or unlawful or the examiner's original fact findings are not supported by substantial evidence. *Id.* § 21.303(b)(2) (Vernon 1996); 19

TEX.ADMIN.CODE § 157.1071(g) (2000). The Commissioner's decision must include fact findings and legal conclusions, which may be adopted by reference from the local record. tex.Educ.Code Ann. § 21.304(a) (Vernon 1996).

A court may not reverse the Commissioner's decision unless it was not supported by substantial evidence or unless its legal conclusions are erroneous. *Id.* § 21.307(f) (Vernon 1996). The court may not take new evidence. *Id.* § 21.307(e) (Vernon 1996).

III. Standard of Review

Miller had the burden in court to demonstrate lack of substantial evidence. *Firemen's & Policemen's Civ. Serv. Comm'n v. Brinkmeyer,* 662 S.W.2d 953, 956 (Tex.1984); *Farris v. Fort Bend Indep. Sch. Dist.,* 27 S.W.3d 307, 311 (Tex.App. – Houston [1st Dist.] 2000, no pet.). Substantial evidence means more than a mere scintilla; thus, the evidence may preponderate against the agency's decision, yet still amount to substantial evidence. *Mireles v. Texas Dep't of Pub. Safety,* 9 S.W.3d 128, 131 (Tex.1999). The test is whether reasonable minds could have reached the same conclusion as the Commissioner. *Texas State Bd. of Dental Examiners v. Sizemore,* 759 S.W.2d 114, 116 (Tex.1988); *Farris,* 27 S.W.3d at 311. Whether substantial evidence exists to support an agency's determination is a question of law. *Montgomery Indep. Sch. Dist. v. Davis,* 34 S.W.3d 559, 566 (Tex.2000).

The Commissioner's reasoning for his decision is immaterial if his conclusion is correct. *Texas Employment*

Comm'n v. Hays, 360 S.W.2d 525, 527 (Tex.1962). "Construction of a statute by the administrative agency charged with its enforcement is entitled to serious consideration, so long as the construction is reasonable and does not contradict the plain language of the statute." *Dodd v. Meno*, 870 S.W.2d 4, 7 (Tex.1994). Although this statute is remedial and should be construed broadly, "we are not inclined to reverse the Commissioner's reasonable determination in an area where he possesses considerable authority and expertise." *Id.*

IV. Discussion

A. HISD's Preliminary Arguments

In its first reply point, HISD argues Miller has waived review because her issues focus on whether *the board's or examiner's findings* are supported by substantial evidence, when we should apply the test only to *the Commissioner's findings*. We disagree because, however she describes it, Miller is clearly attacking the Commissioner's decision upholding her discharge and the modified fact findings and legal conclusions on which that decision rests. *See* tex.R.App.P. 38.9 (briefing rules to be construed liberally).

On the merits, HISD claims we must look for substantial evidence supporting the Commissioner's findings that are adverse to Miller, rather than for that supporting the examiner's findings that were favorable to Miller. This is so because, HISD argues, if a board changes an examiner's fact finding to say the opposite after determining – rightly or wrongly – that substantial evidence does not support that finding, and if the Commissioner

then adopts the board's new fact finding, we may then apply the substantial evidence test only to that new fact finding in the Commissioner's order. That is, we must completely ignore any contrary fact findings from lower administrative levels when reviewing the evidence. We do not agree entirely.

It is true that we review the Commissioner's decision. *See* tex.Educ.Code Ann. § 21.303(b)(2). But what did the Commissioner review and what did he decide? Here, the Commissioner "adopted and incorporated for all purposes" the board's decision, "as modified herein." He had to accept the board's decision unless it was arbitrary, capricious, or unlawful *or the examiner's original fact findings* were not supported by substantial evidence. *See id.* § 21.303(b)(2); 19 tex.Admin.Code § 157.1071(g). That is, although the Commissioner reviews the board's decision, he measures the evidence against the *examiner's* fact findings, not the board's, to see if substantial evidence supports them and thus to determine if the board erred in determining otherwise.

Whether substantial evidence exists is a question of law. *Davis,* 34 S.W.3d at 566. We review the Commissioner's legal conclusions to determine whether they are erroneous. tex.Educ.Code Ann. § 21.303(b)(2) (review is for whether legal conclusions were erroneous *or* whether substantial evidence supported decision). Therefore, when we review the Commissioner's "decision," we are reviewing his legal conclusion that the board correctly found substantial evidence did not support the examiner's fact findings. *See id.* This can be done only by reviewing the examiner's fact findings. As a policy matter, we note the examiner's hearing is akin to a trial and

his fact findings from that "trial" are subject to limited review. Thus, it makes sense to consider those original fact findings in determining whether the Commissioner correctly decided the case.

Moses v. Fort Worth Independent School District, on which HISD relies, is not to the contrary. 977 S.W.2d 851 (Tex.App. – Fort Worth 1998, no pet.). The *Moses* court was merely reciting section 21.303(b)(2)'s language. *Moses,* 977 S.W.2d at 854. The court then went on to hold that "[b]ecause there was not a complete local record [filed with the Commissioner], and specifically no testimony at all, there was not substantial evidence to support *the school board's* decision. . . . We hold that the Commissioner was correct in his decision to reverse the school board's decision. There is substantial evidence to support the Commissioner's conclusion that the education code creates a mandatory filing deadline,[4] that Fort Worth ISD did not meet this deadline, and that without the local record there was not substantial evidence to support *the school board's* decision." *Id.* at 855 (emphasis added). *Moses* supports our holding.

We overrule HISD's argument.

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[4] This is actually a legal conclusion, subject to an "erroneous" test, rather than to a test for "substantial evidence."

B. Waiver

In issue seven, Miller claims the Commissioner erroneously ignored unnumbered fact findings in the discussion section of the examiner's order that were supported by substantial evidence.

The pertinent part of the examiner's discussion criticized HISD because (1) its policies and procedures were not "so readily clear and established"; (2) the directives its officials gave Miller were "somewhat confusing, if not conflicting"; and (3) communication within HISD about Miller was poor. Neither the board nor the Commissioner adopted these recitations as numbered fact findings.[5] Miller waived this complaint by not raising it either at the administrative level or in the trial court. *Balkum v. Texas Dept. of Pub. Safety*, 33 S.W.3d 263, 267-68 (Tex.App. – El Paso 2000, no pet.); *Texas Dep't of Pub. Safety v. Guajardo*, 970 S.W.2d 602, 606 (Tex.App. – Houston [14th Dist.] 1998, no pet.); *Reyes v. Roma Indep. Sch. Dist.*, Docket No. 083-R2-199, p. 5 (Comm'r Educ.2000); *see also* tex.R.App.P. 33.1.

We overrule issue seven.

C. The Board's Alleged Addition of a Fact Finding

In issue six, Miller claims the Commissioner erred in upholding the board's modification of the examiner's

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[5] The board rejected the remainder of the examiner's discussion section, which defined "neglect" and then found Miller's actions did not meet that definition. Miller does not attack that decision under this issue.

recommendation. The examiner's recommendation originally read as follows:

> Based upon the above findings of fact and conclusions of law, in my capacity as hearing examiner, I recommend the reversal of HISD's decision to terminate Ms. Miller's contract and Ms. Miller be reinstated, however without pay for the period of approximately three months she did not report to work during her grievance process, unless Ms. Miller chooses to use vacation or sick pay benefits to replace wages lost during this period.

The board rejected everything but the following phrase and then adopted that phrase as a fact finding: "for the period of approximately three months, she did not report to work during her grievance process." The Commissioner adopted the board's finding.

Appellant complains only that the board had no authority to add a dispositive fact finding like this.[6] *See Davis*, 34 S.W.3d at 564-65, 566 (holding board may not add fact findings to those examiner makes). A fact finding found *anywhere* in the administrative decision under

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[6] Miller's issue is phrased as a challenge both to the added fact finding and to the rejection of the remainder of the examiner's recommendation, but she does not discuss the latter. Accordingly, she has waived review of the latter challenge. *See* tex.R.App.P. 38.1(h); *Lane Bank Equip. Co. v. Smith S. Equip. Co.*, 981 S.W.2d 302, 305 (Tex.App. – Houston [1st Dist.] 1998), *aff'd on other grounds*, 10 S.W.3d 308 (2000). Moreover, the only requirement for a school board to reject a hearing examiner's recommendation is to give a written reason and legal basis. tex.Educ.Code Ann. § 21.259(b), (d) (Vernon 1996). The board did so.

review will be considered a fact finding, even if mislabeled as something else. *Gibson v. Tatum Indep. Sch. Dist.*, Docket No. 040-R2-1099, pp. 7, 8 (Comm'r Educ.1999). This phrase from the examiner's recommendation was a fact finding, wherever placed and however labeled. Therefore, we hold the board did not add a fact finding. Moreover, a board may always rely on the undisputed evidence. *Davis*, 34 S.W.3d at 565, 567. No one disputes Miller did not work for almost three months. Therefore, the board could rely on this fact to support its conclusion that good cause existed to discharge Miller. *See id.*

Accordingly, we overrule issue six.

D. Substantial Evidence to Support Certain Numbered Fact Findings

In issues one through five, Miller argues the Commissioner erred in upholding the board's rejection or modification of five of the examiner's fact findings for lack of substantial evidence.

1. The Examiner's Fact Finding 52

In issue five, Miller claims the Commissioner erred in upholding the board's rejection of the examiner's fact finding 52:

> Ms. Miller relied upon the instructions and directions of the representatives of HISD in filing her grievance and attempting to alleviate the difficulty in having to travel the extra time to Austin High School.

To the extent this finding means Miller relied on HISD representatives' instructions in filing and prosecuting *the transfer protest*, we hold that it is irrelevant and its rejection, even if error, is harmless. *See* tex.R.App.P. 33.1. To the extent this finding means Miller relied on HISD representatives' instructions that she could stay home pending the transfer protest's resolution, we hold the Commissioner correctly determined that substantial evidence does not support it.

Miller's teaching contract required her to work as assigned and defined good cause for discharge as the grounds alleged by HISD here. Several HISD representatives undisputedly told Miller to report to Stephen F. Austin. Miller admitted without contradiction that no one at HISD *ever* told her that the transfer protest relieved her of reporting to Stephen F. Austin. Reiner also testified without contradiction that he never told Miller this. This is conclusive evidence that Miller did *not* rely on any HISD representative's "instructions and directions" to stay at home during this time.

Accordingly, we hold the Commissioner correctly upheld the board's determination that fact finding 52 lacked substantial evidence.

We overrule issue five.

2. The Examiner's Fact Finding 10

In issue one, Miller claims the Commissioner erred in upholding the board's rulings on the examiner's fact finding 10, which read, "It is also possible for an

employee to be assigned to their [sic] home while undergoing the Grievance Process." The board made two alternative rulings: it (1) rejected this fact finding as not supported by substantial evidence and, alternatively, (2) redesignated the finding as a legal conclusion that the board then changed to read, "An employee may not be reassigned to his or her home pending the outcome of a dispute under the Dispute Resolution Process." The Commissioner upheld the board's rejection of this fact finding on the ground that it was not supported by substantial evidence.

Whether it is one of law or fact, this finding is merely one regarding HISD's general policy. It has nothing to do with whether *Miller* was ever assigned to her home, and the evidence conclusively establishes she was not. Therefore, this change did not harm Miller.

We overrule issue one.

3. The Examiner's Fact Finding 48

In issue four, Miller claims the Commissioner erred in upholding the board's modification of the examiner's fact finding 48, which had read, "Ms. Miller substantially performed under the Grievance Process and complied with the instructions or directives give [sic] as set forth in Dr. Paige's September 10, 1997 letter." The board changed the finding to read, "Ms. Miller substantially performed under the Grievance Process but failed to comply with the instructions or directives given as set forth in Dr. Paige's September 10, 1997 letter." Dr. Paige's letter read in pertinent part as follows, "At this time, you may want to instruct Ms. Miller to report to Austin High School.

Her failure to follow the previous directive may have serious consequences. If Ms. Miller is concerned about the assignment, she should follow the district policy for dispute resolution. Please contact the office of Professional Standards at 713-892-7324 for procedural information."

To the extent this finding's original wording meant Miller followed Dr. Paige's suggestion to pursue *the transfer protest*, we hold it is irrelevant and its modification is thus harmless. *See* tex.R.App.P. 33.1. To the extent the original wording meant Miller complied with Dr. Paige's directive to report to Stephen F. Austin during the transfer protest, we hold the Commissioner correctly determined that substantial evidence does not support it. The evidence conclusively establishes Miller did not report to Stephen F. Austin for another two months after this letter.

We overrule issue four.

4. The Remaining Disputed Fact Findings

The changes made to the remaining fact findings Miller challenges in issues two and three are irrelevant because they do not concern the reason Miller was discharged; rather, they concern only the instigation of the transfer protest. Moreover, any error was harmless because (1) it was undisputed Miller did not report to work for three months and (2) this is the sole reason she was discharged.

We overrule issues two and three.

E. Fact Findings Redesignated as Legal Conclusions

In issue 10, Miller claims the Commissioner erroneously upheld the board's redesignation of the following fact finding as a legal conclusion:

> In the event that an employee is dissatisfied with the decision of the immediate supervisor (Level I), the employee may appeal to the next vertical line supervisor in a Level II hearing which is required to be held within ten (10) days.

After deeming this finding a legal conclusion, the board modified it as follows:

> In the event that an employee is dissatisfied with the decision of the immediate supervisor (Level I), the employee may appeal to the next vertical line supervisor in a Level II hearing which is [sic] should be held within ten (10) days. If the Level II conference is not held within the allotted timeline the employee may immediately appeal the concern/dispute to the next level.

The Commissioner upheld both the redesignation and the modification.

We hold any error was harmless. The only way this finding could be material is in support of Miller's argument that, had the Level II hearing before Dr. Stroud been held within 10 days, as Miller claims this HISD procedure requires, Dr. Stroud would have ordered Miller to work, and Miller would have reported to work, before the date Principal Trevino recommended Miller's termination. However, this does not change the undisputed fact that

Miller did not report to work for 51 days *before* the date she claims Dr. Stroud should have heard the transfer protest. That is, the board's change to this finding does not affect these 51 days Miller was absent. Therefore, any error had no effect on the Commissioner's conclusion to uphold Miller's discharge.

Accordingly, we overrule issue 10.

In issue eleven, Miller claims the Commissioner erroneously upheld the board's redesignation of the following fact finding as a legal conclusion, which the board then rejected:

> There is no written policy instruction or direction within the HISD Grievance Process that states that an employee must have to physically report for work while grieving an involuntary transfer during the Grievance Process.

The Commissioner upheld the board's decision.

Whether it is one of law or fact, this finding is merely one regarding HISD's general policy. It has nothing to do with whether *Miller* was ordered to work pending her grievance, and the undisputed evidence conclusively establishes Miller was ordered to work and that no one ever assigned her to her home then. Therefore, this change, if error, was harmless. *See* tex.R.App.P. 33.1.

Accordingly, we overrule issue 11.

F. Changes to the Examiner's Legal Conclusions

In issues eight and nine, Miller claims the Commissioner erred in upholding the board's rejection or modification of the examiner's legal conclusions two and

three. Each conclusion had stated that HISD failed to prove lawful cause for discharge (the board changed one conclusion to state that HISD had proved this). The Commissioner determined these conclusions were actually ultimate fact findings, to be measured under the substantial evidence test.[7] He then upheld their rejection or modification because, under the board's amended fact findings that the Commissioner had already upheld, substantial evidence did not support the examiner's original findings. The Commissioner ultimately ruled that Miller's failure to report to work for three months constituted good cause for termination and that her discharge was thus not arbitrary, capricious, or unlawful.

Miller first complains of the board's reviewing conclusions two and three de novo instead of for substantial evidence because they were ultimate fact findings, not legal conclusions. However, the Commissioner agreed with Miller on this. Thus, the complaint is moot. Miller next argues that the Commissioner erred in concluding substantial evidence did not support these ultimate fact findings. Given that we have already upheld the finding that Miller did not report for work for three months despite being ordered to do so and that the undisputed evidence conclusively showed that no one ever told Miller her transfer protest relieved her of working, we hold the Commissioner did not err. *See Cox v. Andrews Indep.*

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[7] *See, e.g., Ball v. Kerrville Indep. Sch. Dist.*, 504 S.W.2d 791, 798 (Tex.Civ.App. – San Antonio 1973, writ ref'd n.r.e.) (holding whether good cause exists for terminating teacher's contract is a fact finding); *accord Gibson v. Tatum Indep. Sch. Dist.*, No. 040-R2-1099, p. 8 (Comm'r Educ.1999) (same).

Sch. Dist., Docket No. 092-R2-199, pp. 3-5 (Comm'r Educ.1999) (concluding good cause existed to terminate teacher's term contract when teacher intentionally skipped one day of school after her supervisor refused to grant her leave, when teacher "knew that termination was a real possibility"; teacher materially breached her contract because "showing up for work goes to the heart of the contractual agreement").

We overrule issues eight and nine.

We affirm the judgment.

APPENDIX B

[Dr. Stroud's Report and Recommendation]

Statement of Case

Ms. Marsha Miller filed an appeal complaining of her reassignment as counselor in the Houston Independent School District. Ms. Miller was represented by Michael Tomasic, Attorney at Law. Mrs. Miller's complaint was threefold: she was not consulted regarding the change of assignment, the change of assignment necessitated additional drive time, the move was not made in good faith according to normal contractual agreements.

Findings

After consideration of the record, I make the following findings:

1) On September 22, Ms. Miller filed her complaint regarding her reassignment in July 1997.

2) No specific violations of policy were cited when this dispute was filed.

3) Ms. Miller admits that she has not reported to her assignment at Austin High School nor spoken to the principal or East District Superintendent.

4) Ms. Miller was notified of her reassignment in July.

5) Ms. Miller calls in daily asking for a reassignment.

6) Ms. Miller has not sought flexible scheduling with the Austin Principal.

7) Ms. Miller has not sought other placement options.

8) Other personnel at Lamar High School were reassigned during the same time period.

9) The District Superintendent has the authority to reassign personnel according to HISD Administrative Procedures # 522.226.

Decision

Ms. Miller was reassigned from Lamar High School to Austin High School sometime during the month of July. She was notified of this reassignment by the District Superintendent. She also received several correspondences from the Superintendent of Schools related to this reassignment. Ms. Miller has refused to report to her assignment or seek an adjustment in her schedule from the Austin principal.

Ms. Miller has failed to show any violation of policy or statue by the District Superintendent. Her claim is denied.

Resolution

Ms. Miller should not receive back pay nor benefits. She was assigned to a comparable position but has refused to report to this assignment.

Ms. Miller should report to the Austin High School assignment as directed. She should continue in this assignment while seeking one that is closer to her home because policy does not dictate that placement be based on location or residence. The Department of Human Resources and the District Superintendent's Office should assist her in seeking available positions in counseling or other areas in which she is certified.

/s/ Margaret Stroud _____ 11/05/97 _____
Signature Date

APPENDIX C

DOCKET NO. 042-LH-1297

HOUSTON INDEPENDENT SCHOOL DISTRICT	§	BEFORE THE
	§	INDEPENDENT
VS	§	CERTIFIED HEARING
	§	
MARSHA MILLER	§	EXAMINER

RECOMMENDATION OF INDEPENDENT HEARING EXAMINER

Statement of the Case

Petitioner, Houston Independent School District, proposed termination of Respondent, Marsha Miller's continuing contract due to (1) repeated failure to comply with official directives and established school board policy; and (2) repeated and continuing neglect of duties. Respondent requested a hearing, pursuant to Texas Education Code §21.207.

John W. Donovan is the Certified Independent Hearing Examiner assigned by the Texas Education Agency to preside at the hearing. Petitioner is represented by Miles Bradshaw, Assistant General Counsel, Houston Independent School District, Houston, Texas. Respondent is represented by Michael Tomasic, Attorney at law, Houston, Texas.

Findings of Fact

After due consideration of the credible evidence, matters officially noticed, and argument of counsel in my

capacity as Certified Independent Hearing Examiner, I make the following findings of fact:

1. Ms. Miller has been employed by Houston Independent School District ("HISD") for twenty (28) years as a teacher and guidance counselor.

2. Ms. Miller and HISD entered into a Continuing Teacher's Contract on or about April 28, 1975.

3. In mid July, 1997, without prior consultation with Ms. Miller, HISD transferred Ms. Miller from Lamar High School in the Central District to Stephen F. Austin High School in the East District.

4. On December 19, 1997 HISD gave Ms. Miller notice of intent to terminate her contract.

5. HISD has Procedures established concerning the Dispute Resolution Process (the "Grievance Process") applicable to conditions of work.

6. The stated purpose of the Grievance Process is to provide:

> a. "An orderly process for the prompt and equitable resolution of concerns regarding wages, hours and conditions of work."
>
> b. "An employee shall be entitled to representation at any and all meetings that directly related to the issues which are being addressed in the Dispute Resolution Process."
>
> c. "The resolution of concerns in an expeditious manner. The time frame set forth at each level of the process are maximums and, whenever possible, the decision maker should render a decision or resolution within a shorter period of time.

d. All time frames within the Grievance Process are calendar days.

e. "The parties involved may mutually agree to modify the procedures as may be necessary to accomplish the goal of resolving disputes/concerns in the most efficient and expeditious manner possible."

7. In the event that an employee is dissatisfied with the decision of the immediate supervisor (Level I), the employee may appeal to the next vertical line supervisor in a Level II hearing which is required to be held within ten (10) days.

8. After a hearing at Level II, the employee may further appeal the decision to the Board of Education at a Level II hearing in which the Board of Education is to make every effort to hear the dispute within thirty (30) calendar days of this receipt.

9. There is no written policy instruction or direction within the HISD Grievance Process that states that an employee must have to physically report for work while grieving an involuntary transfer during the Grievance Process.

10. It is also possible for an employee to be assigned to their home while undergoing the Grievance Process.

11. HISD knew that a primary reason Ms. Miller contested her involuntary transfer was because she was greatly concerned about her teenage daughter's psychological problems resulting in her daughter cutting herself with a paring knife over a period of months.

12. In the spring of 1997 and through the fall of 1997, Ms. Miller's daughter began to cut herself with a paring knife and mutilated her stomach, thighs, arms, wrists, face, forehead, cheeks and chin to the point that she required psychological help.

13. At all material times, Mr. Raymond Reiner, in his capacity as the Central District Superintendent, acted as the administrative representative of HISD in connection with the Grievance Process followed by Ms. Miller.

14. Ms. Miller retained an attorney, Mr. Tomasic, to act on her behalf regarding her involuntary transfer and to meet with Mr. Reiner, after having at least one unsuccessful meeting with Mr. Reiner, about the issue.

15. On August 12, 1997, Ms. Miller attempted to contact Jose Trevino, Austin High School's principal by telephone, but he was not available so instead she left a message with another teacher to give to Mr. Trevino saying she would not be able to work there.

16. Mr. Reiner met with Ms. Miller and her Attorney on August 13, 1997 after receiving a letter from Mr. Tomasic dated August 6, 1997.

17. Following the August 13, 1997 meeting, Mr. Reiner's office mistakenly sent Ms. Miller and her attorney a letter intended for Ms. Diana Cooper instead of the letter which he intended, which was never received by Ms. Miller, or her attorney.

18. After meeting with Mr. Reiner on August 13, 1997, Ms. Miller called into Mr. Reiner's office on each school day to report in and nothing was said to her about letters being sent from Mr. Trevino.

19. Neither prior to the meeting with Mr. Reiner nor any reasonable time thereafter was Mr. Trevino notified of the grievance process by HISD.

20. Mr. Reiner prepared for Dr. Rod Paige's, the Superintendent of HISD signature two (2) letters dated August 27, 1997 and September 10, 1997, responding to the correspondence from Ms. Miller's attorney dated August 6, 1997 and August 20, 1997.

21. HISD failed to prove that Ms. Miller received the letters or notices of letters of August 21, 1997, September 25, 1997, October 9, 1997 which were sent certified mail and registered mail[1].

22. Mr. Trevino was aware the certified letters were being returned unclaimed by Ms. Miller.

23. This was Mr. Trevino's first experience with an employee grieving a transfer.

24. Mr. Trevino would have tried to help Ms. Miller if he had known of her circumstances in August 1997.

25. In August, 1997, Mr. Trevino knew that Ms. Miller intended to grieve the involuntary transfer and that she was represented by an attorney.

26. Mr. Trevino never attempted to ascertain who Ms. Miller's attorney was, or communicate or correspond with him.

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[1] It is uncertain from the evidence what is meant by "registered mail" (i.e. some type of receipted mail or regular first class mail or certified and registered are one and the same letter.)

27. Mr. Tomasic never formally advised Mr. Trevino he was representing Ms. Miller, although HISD was aware of the representation.

28. Mr. Trevino never wrote to Ms. Miller's attorney nor attempted to communicate with him even though he knew that a grievance process was occurring and he knew that Ms. Miller was not receiving her certified letters because they came back to him.

29. Although Mr. Trevino knew something about a grievance filed by Ms. Miller, the administration did not communicate with him and he never participated in the process.

30. Mr. Trevino was not copied on the letters from HISD dated August 27, 1997, September 10, 199[7], and never saw the letter dated September 25, 1997.

31. No one who participated in the process, Mr. Reiner, Mr. Jimenez, Dr. Scalfani, Dr. Stroud, Ms. Garza, Mr. Tomasic or Ms. Miller, discussed the grievance process with Mr. Trevino.

32. Dr. Paige's September 10, 1997 letter to Mr. Tomasic states that "You may want to instruct Ms. Miller to report to Austin High School. Her failure to follow the previous directive may have serious consequences." The correspondence does not state that Ms. Miller must physically report to Austin High School, nor does it state that the failure to physically report will result in a recommendation of termination.

33. Dr. Pa[i]ge's September 10, 1997 letter to Mr. Tomasic further states that: "If Ms. Miller is concerned

about the assignment, she should follow the district policy for dispute resolution. Please contact the office of Professional Standards at 713-892-7324 for procedural information."

34. Ms. Miller and her attorney attended the September 18, 1997 HISD School Board meeting at which time he spoke about the need to provide a method for the resolution of such problems as Ms. Miller was experiencing.

35. After his presentation, Dr. Susan Scalfani, Dr. Paige's Chief of Staff met with Mr. Tomasic and Ms. Miller and discussed the Ombudsman Program and the Grievance Process.

36. Dr. Scalfani explained the Grievance Process which should begin with Mr. Reiner because there was no building principal at Lamar at that time. She also introduced Ms. Miller and her attorney to Mr. Trahan, a member of the Ombudsman team.

37. Ms. Miller and her attorney met with Mr. Trahan the following day and presented their concerns.

38. Mr. Trahan called back stating that he spoke about Ms. Miller not being paid, but did not address anything regarding the involuntary transfer.

39. Ms. Miller filed her grievance as Dr. Scalfani had advised her to do on September 22, 1997.

40. The grievance was subsequently assigned by Mr. Michael Jimenez to Dr. Margaret Stroud instead of Mr. Reiner who was in part responsible for the decision to transfer Ms. Miller, and had effectively conducted the Level I hearing.

41. The hearing before Dr. Stroud should have occurred within ten (10) days of September 22, 1997, according to policy, however, it the original date was canceled and it did not occur until the last day of October, 1997.

42. During this time, Mr. Trevino made his recommendation to terminate Ms. Miller on October 17, 1997 after the time in which her Level II grievance should have been heard and decided, had HISD followed the guidelines and procedures.

43. Ms. Miller received Dr. Stroud's decision on or about November 5, 1997.

44. Dr. Stroud concluded that Ms. Miller "Should report to Austin High School as directed. She should continue in this assignment while seeking one that is closer to her home because policy does not dictate that placement be based on location of residence. The Department of Human Resources and the District Superintendent's Office should assist her in seeking available positions in counseling or other areas in which she is certified."

45. Ms. Miller followed Dr. Stroud's ruling and reported to Austin High School on the next work day, November 8, 1997[2] as Dr. Stroud directed.

46. Ms. Miller continued the Grievance Process by appealing Dr. Stroud's decision in November, 1997 while she continued to work at Austin High School.

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[2] Note: according to the calendar November 8, 1997 is a Saturday.

47. The HISD School Board conducted its Level III hearing in February, 1998 approximately two (2) months later than the thirty (30) days in which such hearing is supposed to be conducted, and upheld Dr. Stroud's determination.

48. Ms. Miller substantially performed under the Grievance Process and complied with the instructions or directives given and as set forth in Dr. Paige's September 10, 1997 letter.

49. Ms. Miller's state of mind during the Grievance Process was affected by her concerns for her daughter, she couldn't cope with the transfer, she was hysterical, she couldn't sleep, she was constantly crying.

50. During the entire grievance process, Ms. Miller did not realize that she might be terminated, instead she thought that the grievance process and Dr. Stroud's hearing consolidated all such issues.

51. Ms. Miller has been a faithful employee of HISD never missing work since the birth of her sixteen year old daughter until this period.

52. Ms. Miller relied upon the instructions and directions of the representatives of HISD in filing her grievance and attempting to alleviate the difficulty in having to travel the extra time to Austin High School.

DISCUSSION

Although Ms. Miller's actions or conduct in this process is not ideal, it is not without merit, or unreasonable and does not amount to a cause for discharge.

Regarding the claim of compliance with official directives and established school board policy:

The policy and procedure of HISD pertaining to this particular circumstance, does not appear to be so readily clear and established. The directives received by Ms. Miller from the various HISD officials are somewhat confusing, if not conflicting.

Not only was communication between HISD and Ms. Miller poor, there appears to have been poor communication between the various HISD departments and divisions. If during an earlier point in the course of event, say prior to October 17, 1997, someone would have brought the three factions together (Reiner, Trevino, Miller) I suspect this hearing would not have been necessary.

In any event, the record before me contains evidence of less than ideal conduct by both parties, and there is evidence of reasonable basis of Ms. Miller's conduct.

Regarding the claim of repeated failure and continuing neglect of duties:

The term "neglect" as defined by Black's Law Dictionary states:

> "neglect – the omission of proper attention; avoidance or disregard of duty from heedlessness, indifference, or willfulness; failure to do, use, or heed anything;
>
> Black's Law Dictionary 4th Edition (Rev.)

The actions taken in the circumstances by Ms. Miller as supported by the evidence herein, hardly shows Ms. Miller lacked attention, or was heedless, indifferent or failed to do anything. The actions of Ms. Miller and her

representative reflect utmost concern and attention to the circumstances of her transfer and duties associated with her employment with HISD.

Conclusions of Law

1. Jurisdiction is proper under Texas Education Code Sections 21.154(a) and 21.251(a)(1).
2. HISD has failed to sustain its burden of proof that there was lawful cause for discharge of Ms. Miller.
3. HISD has failed to sustain its burden of proof that lawful cause for discharge existed to terminate Ms. Miller's continuing contract for:
   (a) repeated failure to comply with official directives and established school board policy; and
   (b) repeated and continuing neglect of duties.

Recommendation

Based upon the above findings of fact and conclusions of law, in my capacity as hearing examiner, I recommend the reversal of HISD's decision to terminate Ms. Millers' contract and Ms. Miller be reinstated, however without pay for the period of approximately three months she did not report to work during her grievance process, unless Ms. Miller chooses to use vacation or sick pay benefits to replace wages lost during this period.

SIGNED and issued this 21st day of May, 1998.

/s/ John W. Donovan
JOHN W. DONOVAN
HEARINGS EXAMINER

APPENDIX D

DOCKET NO. 146-R2-798

MARSHA MILLER	§	BEFORE THE
V.	§	COMMISSIONER OF EDUCATION
HOUSTON INDEPENDENT SCHOOL DISTRICT	§	THE STATE OF TEXAS

DECISION OF THE COMMISSIONER

Statement of the Case

Petitioner Marsha Miller appeals the decision of the Houston Independent School District to terminate her continuing contract of employment as a counselor.

Joan Howard Allen is the Administrative Law Judge appointed by the Commissioner of Education. Petitioner is represented by Michael S. Tomasic, Attorney at Law, Houston, Texas. Respondent is represented by Miles T. Bradshaw, Attorney at Law, Houston, Texas.

Findings

After due consideration of the record and matters officially noticed, in my capacity as Commissioner of Education, I find that the following are supported by substantial evidence:

1. Respondent board of trustees voted on June 10, 1998 to terminate Petitioner's contract of employment after modifying the recommended findings of fact and

conclusions of law issued by a certified hearing examiner. The board's revised order was issued in written form on June 19, 1998. Petitioner filed her appeal with the Commissioner of Education on June 30, 1998.

2. The decision of the board of trustees, as modified herein, is hereby adopted and incorporated for all purposes.

Discussion and Further Findings

Petitioner contends that the board impermissibly modified the recommended findings of fact and conclusions of law, that the district violated its board policies with regard to a grievance Petitioner had filed concerning her transfer to another campus, and that the board predetermined the outcome of Petitioner's proposed termination. Respondent filed special exceptions, which are denied. With regard to the predetermination issue, there is no evidence to support the allegation.

Petitioner grieved her reassignment to another school, asserting increased family difficulties that were of a significant nature. For three months during the pendency of the grievance, Petitioner failed to report to work. A recommendation was made to terminate her employment. The certified hearing examiner held that there was a reasonable basis for Petitioner not to comply with official directives and school policies and that Petitioner did not repeatedly neglect her duties. Respondent then reviewed the record and determined that a number of statements designated as findings of fact were actually

conclusions of law and modified or rejected them, ultimately deciding that Petitioner's continuing contract should be terminated.

We turn first to the district's primary rationale for redesignating findings of fact as conclusions of law. Respondent contends that many of the redesignated findings set forth, interpret or apply board policies to the facts of the case. Board policies, asserts Respondent, are in fact the law of the school district and therefore, any statement or interpretation of a board policy is a conclusion of law.

Tex. Educ. Code §11.151 provides that a school district board of trustees has the exclusive power to govern and oversee the management of the district. Any power or duty not expressly delegated to the state is reserved for the board of trustees and the agency cannot substitute its judgment for that of the board of trustees. The board is authorized to adopt policies to carry out its powers and duties. Tex. Educ. Code §11.163 grants to a board of trustees the sole authority to adopt employment policies and terms of employment. Consequently, only the board of trustees has the authority to interpret and apply these policies. The board cannot be bound by the policy interpretation of a certified hearing examiner. Such being the case, it must be concluded that the application and interpretation of a board policy is akin to a conclusion of law (the law governing the case) and can be modified or rejected by the board. The board has the authority to redesignate findings as conclusions of law. *Roberts v. San Benito ISD*, No. 046-R2-1196. However, this holding is narrow in scope: it applies only to the interpretation or application of board policies. It does not allow a board to

add findings in support of the construction of board policy.

We now turn to the board's actions to modify or reject certain portions of the hearing officer's recommendation. Findings 7[1] and 9[2] were deemed to be conclusions of law and were modified or rejected. Both state, interpret or apply board policy. These modifications are approved.

The board made other modifications after findings were redesignated as conclusions of law. The following modifications involved fact findings and not conclusions of law. The following modifications are disapproved on this basis: Findings 41[3] (improperly designated as a conclusion of law; additional statement setting forth policy

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[1] As modified, Finding 7 states: "In the event that an employee is dissatisfied with the decision of the immediate supervisor (Level I), the employee may appeal to the next vertical line supervisor In a Level II hearing which is ~~required to~~. *should* be held within ten (10) days. *If the Level II conference is not held within the allotted timeline, the employee may immediately appeal the concern/dispute to the next level.*

[2] As rejected, Finding 9 reads: "There is no written policy instruction or direction within the HISD Grievance Process that states that an employee must have to physically report for work while grieving an involuntary transfer during the Grievance Process."

[3] As modified, Finding 41 reads: "The hearing before Dr. Stroud should have occurred within ten (10) day of September 22, 199 [sic], according to policy, however the original date was canceled and it did not occur until the last day of October 1997. *Nonetheless, the employee always has the right to immediately appeal the dispute to the next level if time frames are not met.*"

not permitted), 42[4] (improperly designated as a conclusion of law; deletion inappropriate), and 47[5] (improperly designated as a conclusion of law). As noted above, the board cannot use the policy interpretation exception to add additional findings.

The board also modified several findings on the basis that substantial evidence did not exist to support the findings. Findings 10, 34, 39, 48[6] and 52 as modified, are upheld. With regard to Finding 48, it is noted that while Petitioner testified that she did not see Dr. Paige's directive, there is no evidence that her attorney, to whom the communication was appropriately sent, did not receive the letter.

The district's board also redesignated a fact finding regarding service of directives by certified mail as a conclusion of law. Respondent argues that if a document is sent by both first class and certified mail and only the

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[4] Finding 41, as modified, reads: "During this time, Mr. Trevino made his recommendation to terminate Ms. Miller on October 17, 1997, ~~after the time in which her Level II grievance should have been heard and decided, has HISD followed the guidelines and procedures.~~"

[5] As modified, Finding 47 reads, "The HISD School Board conducted it's [sic] Level III hearing in February, 1998, approximately two (2) months later than the thirty (30) days in which *the Board is supposed to make every effort possible to hear* ~~such hearing is supposed to be conducted.~~ and upheld Dr. Stroud's determination.

[6] Finding 48, as modified by the board, reads, "Ms. Miller substantially performed under the Grievance process ~~and complied with~~ *but failed to comply with* the instructions or directives given and as set forth in Dr. Paige's September 10, 1997, letter."

certified mailing is returned "refused," a legal presumption is created that the document was actually received. However, this is a rebuttable presumption and Petitioner rebutted the presumption through her sworn statement that she did not receive either type of mailings. Respondent failed to put forth any controverting evidence regarding the delivery of the documents. *Lorentzen v. Kliesing*, 810 S.W.2d 16 (Tex. App. – 4 Dist. 1990). Thus, Finding 21[7], while correctly designated as a conclusion, was not supported by the findings as modified by the board.

Once the fact findings are established, one must look to the conclusions of law to determine whether the facts support the conclusions. If the facts would support either of two conclusions, the board of trustees may determine for itself the conclusions of law and the relief, if any. In order to sustain the board's termination action, substantial evidence must exist. Petitioner's failure to report to work for three months, after being directed to do so, constitutes good cause for termination. However, the board's action to strike Conclusion of Law no. 2[8], which stated that the district did not meet its burden of proof that there was lawful cause for discharge is not a conclusion of law, but rather an ultimate fact finding. *Moss v. Benavides ISD*, No. 009-RS-997 (1997). It could only be

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[7] Finding 21, as rejected by the board, reads: "HISD failed to prove that Ms. Miller received the letters or notices of letters of August 21, 1997, September 25, 1997, October 9, 1997, which were sent certified mail and registered mail.

[8] Conclusion 2, which was stricken, stated, "HISD failed to sustain its burden of proof that there was law cause for discharge of Ms. Miller."

changed if substantial evidence did not exist to support it. By virtue of the previously approved modifications and rejections, substantial evidence did not exist to support the finding and therefore, the district has the authority to modify or reject the finding. The same reasoning applies to Conclusion of Law No. 3[9], again involving the burden of proof.

The board voted to terminate Petitioner's contract when it modified the certified hearing examiner's recommended proposed relief. The board has more leeway in determining the appropriate outcome of an employment action, so long as that outcome is supported by the facts and the conclusions. *Peters v. Fort Worth ISD*, No. 047-R3-1196 (1997). In this case, the findings and conclusions support the decision of the board to terminate Petitioner's employment contract. Petitioner's appeal should be denied.

Conclusions of Law

After due consideration of the record, matters officially noticed, and the foregoing Findings, in my capacity as Commissioner of Education, I make the following Conclusions of Law:

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[9] Conclusion 3 states, as amended by the board that, "HISD has ~~failed to sustain~~ *met* its burden of proof that lawful cause for discharge existed to terminate Ms. Miller's continuing contract for (a) repeated failure to comply with official directives and school board policy; and (b) repeated and continuing neglect of duties."

1. The Commissioner of Education has jurisdiction over the instant matter pursuant to Tex. Educ. Code Section 21.301.

2. There is no evidence that the board had predetermined the outcome of Petitioner's termination appeal.

3. The following redesignations of findings of fact as conclusions of law by the board are approved, as the board has the authority to state, interpret and apply its policies: Finding Nos. 7 and 9. Tex. Educ. Code §21.259(b).

4. The following rejections by the board of fact findings or portions of findings due to a lack of substantial evidence are approved: Finding Nos. 10, 34, 39, 48 and 52. Tex. Educ. Code §21.259(c).

5. The following modifications are disapproved and the original findings by the certified hearing examiner will stand: Finding Nos. 41 (actually a fact finding), 42 (actually a fact finding), 47 (actually a fact finding). Tex. Educ. Code §21.2599(c).

6. Finding No. 21 was correctly designated as a conclusion of law; as modified by the board, it was not supported by the findings and is disapproved. Tex. Educ. Code §21.259(b).

7. Conclusions of Law Nos. 2 and 3 are ultimate fact findings. As stated by the certified hearing examiner, these findings were not supported by substantial evidence and the board had authority to modify them. Tex. Educ. Code §21.259(c).

8. The findings and conclusions, as modified by the board of trustees, support the holding that Petitioner

repeated failed to comply with official directives and neglected her duties by not reporting to work; such actions constitute good cause for termination.

9. The decision of the board of trustees to terminate Petitioner's continuing contract of employment is supported by substantial evidence and is not arbitrary, capricious or unlawful.

10. Petitioner's appeal should be denied.

ORDER

After due consideration of the record, matters officially noticed, and the foregoing Findings and Conclusions of Law, in my capacity as Commissioner of Education, it is hereby

ORDERED that Petitioner's appeal be, and is hereby, Denied

SIGNED AND ISSUED this 19th day of August, 1998.

/s/ Mike Moses
MIKE MOSES
COMMISSIONER OF
EDUCATION

APPENDIX E

DOCKET NO. 042-LH-1297

HOUSTON INDEPENDENT SCHOOL DISTRICT	§	BEFORE THE HOUSTON
v.	§	INDEPENDENT SCHOOL DISTRICT
MARSHA MILLER	§	BOARD OF EDUCATION

BOARD'S ORDER

ON THIS DAY, the 10th day of June, 1998, came on to be heard by the Houston Independent School District Board of Education (the "Board"), under the authority of Texas Education Code Sections 21.258 and 21.259, the above numbered and entitled cause. After reviewing the record of the proceedings, considering the recommendation of the hearing examiner, considering the recommendations of the administration and the employee, and hearing oral arguments of counsel for both parties, the Board acts as follows:

FINDINGS OF FACT:

1. The Board ADOPTS the following findings of fact of the hearing examiner: 1-6, 8, 11-20, 22-33, 35-38, 40, 43-46 and 49-51;

2. The Board REJECTS the following findings of fact of the hearing examiner: 10[1], 34 and 52;

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[1] The action on this item will depend on whether the Board determines to reject it as a Finding of Fact or redesignate it as a Conclusion of Law and then change it as recommended.

3. The Board CHANGES the following findings of fact of the hearing examiner as recommended in the Administration's Recommendations to Reject or Change the Hearing Examiner's Findings of Fact, Conclusions of Law and Proposal for Granting Relief (hereinafter, the "Administration's Recommendations"), which is incorporated herein for all purposes: 39 and 48;

4. The Board REDESIGNATES a portion of the Recommendation section of the hearing examiner as a finding of fact and ADOPTS it as recommended in the Administration's Recommendations:

CONCLUSIONS OF LAW:

1. The Board REDESIGNATES the following findings of fact of the hearing examiner as conclusions of law and CHANGES them as recommended in the Administration's Recommendations: 7, 9, 10*, 21, 41, 42 and 47;

2. The Board ADOPTS the following conclusions of law of the hearing examiner: 1;

3. The Board REJECTS the following conclusions of law of the hearing examiner: 2;

4. The Board CHANGES the following conclusions of law of the hearing examiner as recommended in the Administration's Recommendations: 3; and

PROPOSAL FOR GRANTING RELIEF:

The Board REJECTS the remaining portion of the Recommendation section as the hearing examiner's proposal for granting relief as recommended in the Administrations' Recommendations; and The Board terminate Ms. Miller's continuing teacher's contract effective June 10, 1998; and

MISCELLANEOUS:

The Board authorizes Board President, Ms. Olga Gallegos, to issue a written letter on behalf of the Board to Ms. Marsha Miller giving the specific reasons and legal basis for each of the rejections and changes made to the hearings examiner's proposed findings of fact, conclusions of law, and his proposal for granting of relief.

BOARD OF EDUCATION OF THE
HOUSTON INDEPENDENT
SCHOOL DISTRICT

_____

Olga Gallegos, President Date
Board of Education

_____

Arthur M. Gaines, Jr., Date
Secretary
Board of Education

_____

Rod Paige Date
Superintendent of Schools

APPROVED AS TO FORM:

_____

Counsel for the Board Date

_____

Name

APPENDIX F

Cause No. 98-45316

Marsha Miller Plaintiff	§ § §	IN THE DISTRICT COURT OF
v.	§	HARRIS COUNTY,
Houston Independent School District and Mike Moses, Texas Commissioner of Education, Defendants	§ § § § § §	TEXAS 133rd JUDICIAL DISTRICT

FINAL JUDGMENT

(FILED Nov. 18, 1999)

BE IT REMEMBERED that on the 26th day of July, 1999, came on to be heard and considered the cause of Plaintiff Marsha Miller for judicial review of an administrative decision of the Commissioner of Education upholding the decision of Houston ISD to terminate her teacher contract. Plaintiff Marsha Miller was represented by attorney Michael S. Tomasic. Defendant Mike Moses was represented by Assistant Attorney General George Warner. Defendant Houston ISD was represented by attorney Andrew Ramzel.

Having considered the administrative record, briefs and arguments of counsel, the Court finds that the decision of the Commissioner of Education should be affirmed. The Court concludes that the decision of the Commissioner of Education is reasonably supported by

substantial evidence. The Court concludes that the conclusions of law of the Commissioner of Education are not erroneous.

IT IS THEREFORE ORDERED that the Decision of the Commissioner of Education upholding the decision of the Houston ISD to terminate the teacher contract of Marsha Miller based on the Administrative Order in Docket No. 146-R2-798, dated August 19, 1998, is AFFIRMED. It is further ORDERED that in this judicial appeal of the Decision of the Commissioner any relief sought by any party not specifically provided herein is DENIED.

SIGNED this 22 day of November, 1999.

/s/ Lamar McCorkle
Honorable Lamar McCorkle
Judge Presiding

Approved as to form:

POPE, SCHOEMAKE, KERR & HENDERSHOT

By /s/ T. Turner Pope, III
T. Turner Pope, III, #16134000

1800 Bering Drive, Suite 600
Houston, Texas 77057
Telephone: (713) 783-3110
Fax: (713) 783-2809

Approved as to form and substance:

JOHN CORNYN
Attorney General of Texas

ANDY TAYLOR
First Assistant Attorney General

LINDA S. EADS
Deputy Attorney General for Litigation

DON WALKER
Chief, Administrative Law Division

By /s/ George Warner by A. Ramzel with permission
George Warner, #20869500

Assistant Attorney General
Administrative Law Division
Post Office Box 12548, Capitol Station
Austin, Texas 78711-2548
Telephone: (512) 475-4300
Fax: (512) 320-0167

McGINNIS, LOCHRIDGE & KILGORE, L.L.P.

By /s/ Andrew Ramzel
Andrew Ramzel, #00784814

3200 One Houston Center
1221 McKinney
Houston, Texas 77010-2009
Telephone: (713) 615-8500
Fax: (713) 615-8585

APPENDIX G

THE SUPREME COURT OF TEXAS
Orders Pronounced September 20, 2001

ORDERS ON CAUSES

THE FOLLOWING MOTIONS FOR REHEARING OF PETITIONS FOR REVIEW ARE DENIED:

01-0451 MARSHA MILLER v. THE HOUSTON INDEPENDENT SCHOOL DISTRICT and THE TEXAS COMMISSIONER OF EDUCATION; from Harris County; 1st district (01-99-01437-CV, RULE 47.7, 03-02-01)

APPENDIX H

HISD Administrative Procedures
Article Five – Employee Procedures

* * *

599.000 Resolution of Employment Disputes

The Dispute Resolution Process established herein provides an employee or employees an orderly process for the prompt and equitable resolution of concerns regarding wages, hours and conditions of work. The Board of Education and the Administration of the Houston Independent School District intend that whenever feasible, concerns be resolved at the lowest possible administrative level. (10-17-96)

* * *

599.040 Time Frames

The primary purpose of the Dispute Resolution Process is the resolution of concerns in an expeditious manner. The time frames set forth at each level of the process are maximums and, whenever possible, the decision maker should render a decision or resolution within a shorter period of time. (10-17-96)

All time frames shall be counted in calendar days, the first day commencing on the next calendar day after the motivating event that formed the basis of the complaint/dispute/concern. The time frames shall not include the district-wide designated holidays.

In the event a decision or resolution has not been rendered within the allotted time frame, an employee may appeal the lack of compliance with established time frames to the next level of

the process. The employee may not file a separate grievance for failure to comply with established time frames under this policy. (10-17-96)

* * *

599.500 **FORMAL PROCESS**

599.510 Level I

An individual who has been unable to resolve a concern/dispute about wages, hours, or conditions of work through the informal process, may file a Dispute Resolution Form within thirty (30) calendar days from the date of the alleged action/decision which forms the basis of the concern/dispute. If the employee did not learn of the action until a later date, the time shall be counted from the date a reasonable person should have learned of the action/decision through reasonable diligence.

The Dispute Resolution Form must clearly state the concern/dispute regarding an issue of wages, hours, or conditions of work. The Dispute Resolution Form must also clearly state a valid remedy that a supervisor may lawfully grant. A Dispute Resolution Form may be rejected on the grounds that it is not a valid concern/dispute of wages, hours, and conditions of work or that no valid remedy has been stated or may be granted for the alleged act/decision.

The Dispute Resolution Form shall be filed with the principal/department head/work location supervisor who has direct supervision of that particular employee.

The immediate supervisor shall convene a conference with the employee within seven (7) calendar days of receipt of the Dispute Resolution Form. The conference is not an evidentiary or due process hearing. The conference is an informal conference for the sole purpose of discussing and resolving concerns or disputes of an employee with respect to wages, hours, or conditions of work. The conference may not be recorded in any manner by any person participating in, or attending the conference. The conference shall be held during normal District business hours, except that no instruction shall be interrupted.

There shall be no cross-examination of any witnesses, nor shall this conference in any way resemble an evidentiary hearing. Each side will simply make presentations to the supervisor within the time restrictions set by the supervisor.

The supervisor, after considering the matters presented at the conference and any other information he or she may have, shall issue a decision or resolution with respect to the concern/dispute held by the employee. The decision/resolution shall be rendered no later than seven (7) calendar days from the date of the conference. The decision/resolution shall be provided to the employee on the original Dispute Resolution Form filed with the supervisor. (10-17-96)

* * *

599.520 Level II

In the event the employee is not satisfied with the decision/resolution of the immediate supervisor or a decision/resolution is not rendered

within the allotted time frame, an employee may appeal the concern/dispute to the next level (Level II) of the Dispute Resolution Process. If the immediate supervisor has not issued a decision/resolution, the employee shall request the return of the original Dispute Resolution Form for filing at Level II.

An employee must file the appeal within seven (7) calendar days of decision/resolution or lack thereof with the next vertical line supervisor. (This shall be at least an Assistant, District, Associate, or Deputy Superintendent level supervisor.) The appeal shall be filed by forwarding the original Dispute Resolution Form with the next level vertical line supervisor. The next level supervisor shall convene a conference within ten (10) calendar days of the date of receipt of the Dispute Resolution Form. The conference shall be held during normal District business hours of the employee requesting the conference.

The conference is not an evidentiary or due process hearing. The conference is an informal conference for the sole purpose of resolving concerns or disputes of an employee with respect to wages, hours, or conditions of work. The conference shall be recorded by a court reporter paid for by the District. The employee shall be allotted a specific amount of time to present his or her concerns. The employee may present witnesses and submit any documentation he or she may have. The immediate supervisor shall be allotted the same amount of time for the presentation of his or her position. He or she may also submit any documentation on the issue.

There shall be no cross-examination of any witnesses, nor shall this conference in any way resemble an evidentiary hearing. Each side will simply make presentations to the next line supervisor within the time restrictions set by the supervisor.

The next line supervisor, after considering the matters presented at the conference and any other information he or she may have, shall issue a decision or resolution with respect to the concern/dispute held by the employee. The decision/resolution shall be rendered no later than seven (7) calendar days from the date of the conference. The decision/resolution shall be provided to the employee on the original Dispute Resolution Form filed with the supervisor. (10-17-96)

599.530 Level III

In the event that the employee is not satisfied with the decision/resolution of the next line supervisor or a decision/resolution is not rendered within the allotted time frame, an employee may appeal the concern/dispute to the next level (Level III of the Dispute Resolution Process. If the immediate supervisor has not issued a decision/resolution, the employee shall request the return of the original Dispute Resolution Form for filing at Level III.

An employee must file the appeal within seven (7) calendar days of decision/resolution or lack thereof with the Board of Education. The appeal shall be filed by forwarding the original Dispute Resolution Form to the Board Services Office, Level I West of the Hattie Mae White Administration Building. The Form should be accompanied by a cover letter addressed to the

President of the Board of Education requesting a hearing.

The Board of Education will make every effort possible to hear the concern/dispute within thirty (30) calendar days of its receipt. Each party, the employee and the immediate supervisor, shall be entitled to make oral arguments before the Board within time restrictions set by the Board.

After hearing and considering the concern of the employee and the response of the administration, the Board may choose to issue a disposition of the concern/dispute or may choose not to act on the concern or dispute. If the Board chooses to issue a disposition, it shall be done in writing no late [sic] than the next regularly scheduled Board meeting. The disposition shall be addressed to the employee and the immediate supervisor. (10-17-96)

599.540 Level IV

If the employee is not satisfied with the decision/resolution of the Board of Education, the employee may take additional action as provided by policy of the State Board of Education or as may be provided by federal or state law. (10-17-96)